

1 UNITED STATES OF AMERICA,)
 2)
 3 Plaintiff,)
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 5 v.) No. CR-01-40120-DLJ
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 7 JOSE ARREOLA,)
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 9 Defendant.)
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ORDER

On June 2, 2008, defendant Jose Arreola ("Arreola") filed a motion attacking his sentence under 28 U.S.C. § 2255. Having considered the papers submitted and the applicable law, the Court hereby DENIES the motion.

I. BACKGROUND**A. Factual Background and Procedural History**

On July 19, 2001, the government filed an indictment against Arreola alleging six counts of drug trafficking and weapons offenses. Count 3 of the indictment alleged the following violation of 18 U.S.C. § 924(c)(1): that Arreola "did knowingly and intentionally possess a firearm during and in relation to the drug trafficking crimes set forth in Counts One and Two of this Indictment, and in furtherance of such crimes."

On December 6, 2001, the government filed a superceding indictment. The superceding indictment charged the same offenses as the original indictment, except that it modified the allegations in Count 3 as follows: "Jose Arreola did knowingly and intentionally use and carry the firearm discussed below during and

1 in relation to, and possessed the same firearm in furtherance of
2 the drug trafficking crimes set forth in Counts One and Two of this
3 Indictment."

4 The case went to jury trial. With respect to the firearm
5 charge described in Count 3, the Court instructed the jury that 18
6 U.S.C. § 924(c)(1) provided two different theories on which to
7 convict Arreola of the same offense. The Court stressed that the
8 jury could convict only if it found that Arreola "carried the
9 firearm during and in relation to, or possessed the firearm in
10 furtherance of the drug trafficking crime." See United States v.
11 Arreola, 467 F.3d 1153, 1162 (9th Cir. 2006). The prosecutor and
12 Arreola's counsel also "reiterated this requirement multiple times
13 throughout their closing statements." Id.

14 The verdict form, by contrast, did not draw a clear line
15 between the two theories of conviction. The verdict form contained
16 the following language: "We, the Jury, find the defendant
17 [guilty/not guilty] of possessing or carrying a firearm in relation
18 to, or in furtherance of, a drug trafficking crime as charged in
19 Count Two of the Indictment." See Verdict Form. This language
20 "permitted the jury to convict Arreola if it found that he
21 possessed a firearm during and in relation to a drug crime," an act
22 not criminalized by the statute. Arreola, 467 F.3d at 1162.

23 On June 10, 2004, the jury found Arreola guilty on one count of
24 possession of heroin with intent to sell, as well as the firearm
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1 charge contained in Count Three. See Verdict Form. This Court
2 entered judgment on September 14, 2004, followed by an amended
3 judgment on September 20, 2004.

4 On September 20, 2004, Arreola filed a notice of appeal. In
5 the appeal, Arreola made two arguments. First, he argued that this
6 Court's jury instructions as to Count 3 violated his Sixth
7 Amendment right to a unanimous jury verdict. Arreola, 467 F.3d at
8 1161. Arreola argued that the language of the indictment was
9 duplicitous because it permitted the jury to "render a guilty
10 verdict without having reached a unanimous verdict on the
11 commission of a particular offense." Id. (internal case citations
12 omitted).

13 The Ninth Circuit rejected this argument. After a long
14 discussion of statutory interpretation, the court concluded that §
15 924(c)(1) defines only one crime, not two. Id. As a result, the
16 court reasoned, the indictment could not have been duplicitous,
17 since even though the statute provided for multiple ways to commit
18 the named offense, there was only one named offense which the jury
19 could have found. Id. The court concluded that this Court's jury
20 instructions, which were based on the language of the indictment,
21 could not have violated Arreola's Sixth Amendment rights. Id.

22 Second, Arreola argued that the verdict form "amounted to a
23 constructive amendment of the indictment in violation of his Fifth
24 Amendment right to a grand jury." Id. at 1161-62. Arreola argued
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1 that the verdict form "erroneously permitted the jury to convict
2 Arreola if it found that he possessed a firearm during and in
3 relation to a drug crime, an act that § 924(c) does not
4 criminalize." Id. at 1162. The Ninth Circuit agreed that the
5 verdict form permitted the jury to wrongfully conflate the two
6 theories of conviction, but it concluded that in light of this
7 Court's instructions and the repeated admonitions of counsel to the
8 contrary, the verdict form by itself did not constructively amend
9 the indictment. Id. As a result, the Ninth Circuit affirmed the
10 conviction. Id.

12 On June 25, 2007, the Supreme Court denied Arreola's petition
13 for a writ of certiorari. Arreola v. United States, 127 S. Ct.
14 3002 (2007). On June 2, 2008, Arreola filed the instant § 2255
15 motion, along with an application to proceed in forma pauperis
16 ("IFP") and a request for judicial notice. In his § 2255 motion,
17 Arreola raises three claims of ineffective assistance of counsel:
18 (1) failure to request a unanimous jury verdict; (2) failure to
19 object to the verdict form; and (3) failure to object to the
20 Court's jury instructions and the prosecutor's closing arguments.
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22 **B. Legal Standards**

23 **1. Statute of Limitations**

24 Motions under § 2255 are subject to a one year statute of
25 limitations. 28 U.S.C. § 2255(f). The statute provides:
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27 The limitation period shall run from the
28 latest of-

1 (1) the date on which the judgment of
2 conviction becomes final;

3 (2) the date on which the impediment to
4 making a motion created by governmental action
5 in violation of the Constitution or laws of
6 the United States is removed, if the movant
7 was prevented from making a motion by such
8 governmental action;

9 (3) the date on which the right asserted
10 was initially recognized by the Supreme Court,
11 if that right has been newly recognized by the
12 Supreme Court and made retroactively
13 applicable to cases on collateral review; or

14 (4) the date on which the facts supporting
15 the claim or claims presented could have been
16 discovered through the exercise of due
17 diligence.

18 Id. Arreola does not argue that subsections (2) - (4) apply to
19 this case. Thus, the general rule contained in subsection (1)
20 controls, and the statute began to run when the judgment became
21 "final." A judgment becomes final "upon the expiration of the time
22 during which [the movant] could have sought review by direct
23 appeal." United States v. Schwartz, 274 F.3d 1220, 1223 (9th Cir.
24 2001). The time for direct appeal expires when the time to
25 petition the United States Supreme Court for certiorari has elapsed
26 or the petition is denied. United States v. Garcia, 210 F.3d 1058,
27 1059-60 (9th Cir. 2000).

28 **2. Application to Proceed IFP**

Upon a showing of good cause, a federal court may waive the
requirement that a litigant prepay certain fees and security
payments. See 28 U.S.C. § 1915(a).

1 **3. Request for Judicial Notice**

2 Federal Rule of Evidence 201 provides that a court may take
3 judicial notice of any fact "not subject to reasonable dispute in
4 that it is either (1) generally known within the territorial
5 jurisdiction of the trial court or (2) capable of accurate and
6 ready determination by resort to sources whose accuracy cannot
7 reasonably be questioned." Fed. R. Evid. 201.

9 **4. Order to Show Cause**

10 Under Rule 4(b) of the Rules Governing Proceedings Under 28
11 U.S.C. § 2255, the Court must make a preliminary review of a § 2255
12 motion when it is filed. If, after review, the Court determines
13 that a cognizable claim on which relief may be granted exists, "the
14 judge must order the United States attorney to file an answer,
15 motion, or other response within a fixed time, or to take other
16 action the judge may order." Id. If, on the other hand, it
17 "plainly appears from the motion, any attached exhibits, and the
18 record of prior proceedings that the moving party is not entitled
19 to relief, the judge must dismiss the motion." Id.

21 **5. Ineffective Assistance of Counsel**

22 The Sixth Amendment guarantees effective assistance of counsel.
23 See Strickland v. Washington, 466 U.S. 668, 686 (1984). To prevail
24 on a claim of ineffective assistance, a defendant must first show
25 that counsel's representation fell below an objective standard of
26 reasonableness. See id. at 688. The defendant must next
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1 demonstrate a reasonable probability that, but for counsel's
2 errors, the result of the proceeding would have been different.
3 Id. at 694.

4 II. DISCUSSION

5 A. Statute of Limitations

6 Arreola's motion is timely. The Supreme Court denied Arreola's
7 petition for a writ of certiorari on June 25, 2007. That act
8 triggered § 2255's one year statute of limitations. Arreola filed
9 the instant motion on June 2, 2008, 23 days before the end of the
10 limitations period. The Court may therefore review Arreola's
11 motion on the merits.
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13 B. Application to Proceed IFP

14 Arreola has submitted an application to proceed IFP. Unlike a
15 petition for a writ of habeas corpus, a motion under § 2255 is
16 filed as part of the underlying criminal prosecution. See 28
17 U.S.C. § 2255. As a result, a § 2255 motion requires no prepaid
18 fees or security in order to proceed. See N.D. Cal. Fee Sched.
19 Because Arreola is not required to pay any fees, there is no need
20 for Arreola to proceed IFP. Accordingly, the Court denies
21 Arreola's request to proceed IFP.
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23 C. Request for Judicial Notice

24 Arreola has filed a request for judicial notice. In addition,
25 Arreola moves to be heard on the question of judicial notice.
26 Arreola only seeks judicial notice of one document: the jury's
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1 verdict form from his 2004 trial. That verdict form is a matter of
2 record in this case. As such, it is not necessary for the Court to
3 take judicial notice of it. Accordingly, the Court denies
4 Arreola's request for judicial notice.

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6 **D. Ineffective Assistance of Counsel**

7 As described below, Arreola fails to make out a cognizable
8 claim for ineffective assistance of counsel.

9 **1. Claim One**

10 First, Arreola claims that his trial counsel failed to request
11 a unanimous jury verdict. Even assuming for argument's sake that
12 counsel erroneously failed to make such a request, this Court
13 instructed the jury on its own that the verdict must be unanimous.
14 See Arreola, 467 F.3d at 1156. As a result, Arreola cannot
15 demonstrate that the outcome at trial would have been different but
16 for the asserted error.

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18 In any event, it is the practice of this Court to provide
19 counsel with a copy of the Court's draft jury instructions prior to
20 the close of trial. In criminal cases, the Court's instructions
21 invariably include a general unanimity instruction. Having
22 reviewed these instructions, Arreola's attorney had no reason to
23 request a unanimous jury verdict. Accordingly, the Court denies
24 relief on this claim.

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26 **2. Claim Two**

27 Arreola's second claim is that counsel failed to object to the
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1 verdict form. Arreola claims the verdict form constructively
2 amended the indictment. This argument is a reiteration of the same
3 claim the Ninth Circuit rejected on direct appeal. See id. at
4 1161-62. The Ninth Circuit's decision is binding on this Court.
5 See United States v. Scrivner, 189 F.3d 825, 828 (9th Cir. 1999).
6 Because the Ninth Circuit has already ruled on this issue, this
7 Court may not revisit the matter. Accordingly, the Court denies
8 this claim.
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10 3. Claim Three

11 Arreola's third claim is that counsel failed to object to
12 certain jury instructions and arguments by the prosecution which
13 improperly conflated the elements of 18 U.S.C. § 924(c)(1). This
14 claim appears to be another reformulation of Arreola's argument
15 that § 924(c)(1) was not properly presented to the jury: that is, §
16 924(c)(1) defines two separate offenses; this Court and counsel
17 failed to properly define the offense for the jury; as a result,
18 Arreola's conviction is unreliable.
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20 The Ninth Circuit has rejected each element of this argument.
21 First, the court ruled that § 924(c)(1) defines one offense, not
22 two. Arreola, 467 F.3d at 1161. Second, the Ninth Circuit held
23 that both counsel and this Court properly defined the charged
24 offense to the jury. Id. at 1162. Last, the court affirmed
25 Arreola's conviction, thereby expressing confidence in the result.
26 Because the Ninth Circuit's opinion is binding on this Court, the
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1 Court denies Arreola's third claim.

2 **III. CONCLUSION**

3 Based on the foregoing, the Court hereby rules as follows:

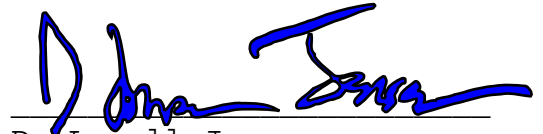
4 (1) The application to proceed IFP is DENIED as moot;

5 (2) The request for judicial notice is DENIED as moot;

6 (3) The § 2255 motion fails to state a cognizable claim is
7 therefore DENIED.
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10 IT IS SO ORDERED

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12 Dated: October 20, 2008

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14 D. Lowell Jensen
15 United States District Judge
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